

Appeal from decision of the Sevier River Resource Area Manager, Bureau of Land Management, cancelling right-of-way UTU-51973 in part.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Cancellation--Rights-of-Way: Federal Land Policy and Management Act of 1976

A right-of-way issued under FLMPA, 43 U.S.C. § 1761 (1988), for the development of a spring and pipeline is properly cancelled when the holder of the right-of-way abandons the project within the meaning of 43 U.S.C. § 1766 (1988) and 43 CFR 2803.4(c) by failing to use the right-of-way for a continuous 5-year period and submits nothing that demonstrates that the failure to use the right-of-way was due to circumstances not within the holder's control.

APPEARANCES: Theron E. Coon, Santa Clara, Utah, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Theron E. Coon has appealed from a November 12, 1991, decision issued by the Resource Area Manager, Sevier River Resource Area, Utah, cancelling right-of-way UTU-51973 in part.

On October 10, 1984, the Bureau of Land Management (BLM) issued right-of-way UTU-51973, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1988), to permit development of two springs, known as Pete Spring #1 and Pete Spring #2, and construction of a pipeline to transport water from the springs to private lands for use in sprinkler irrigation. In paragraph 1, section B, of the grant Coon agreed to comply with applicable regulations contained in 43 CFR Part 2800. Under paragraph 8, section B, the right-of-way grant was to run for 30 years from the effective date of the grant, but it could be relinquished, abandoned, terminated, or otherwise modified pursuant to the terms and conditions of the grant or applicable Federal law and regulations.

In a September 30, 1987, staff report setting out the findings of an earlier compliance examination, BLM Realty Specialist Gary L. Hall noted

that Pete Spring #2 has not been developed and there was no pipeline from this spring. In a letter dated October 8, 1987, BLM advised Coon that if he did not intend to develop this spring, that portion of his right-of-way grant should be relinquished. In a June 18, 1990, staff report Hall noted that a June 12, 1990, compliance examination revealed that Coon had not developed Pete Spring #2 or constructed a pipeline from the spring.

On June 19, 1990, BLM issued a decision holding the right-of-way grant for partial cancellation, basing its decision on 43 CFR 2803.4(c), which provides that:

Failure of the holder of a right-of-way grant to use the right-of-way for the purpose for which the authorization was issued for any continuous five-year period shall constitute a presumption of abandonment. The holder may rebut the presumption by proving that his failure to use the right-of-way was due to circumstances not within the holder's control.

BLM noted that the 5-year period expired on October 9, 1989. Coon was informed that the June 12, 1990, field examination revealed that Pete Spring #1 had been developed and a buried pipeline had been placed from this spring to an irrigation pond located on private land, but Pete Spring #2 had not been developed, and there was no pipeline from that spring. BLM stated that, pursuant to 43 CFR 2803.4(c), right-of-way grant UTU-51973 was presumed abandoned as to Pete Spring #2 and the associated buried pipeline from that spring. Coon was allowed 30 days to rebut the presumption in writing by proving that his failure to use that portion of the right-of-way was due to circumstances beyond his control, and was advised that his failure to submit satisfactory evidence within 30 days would result in partial cancellation of the right-of-way grant.

On July 2, 1990, Coon responded in a letter enumerating problems with the project and setbacks he incurred. He explained that his wife's illness and death made it difficult for him to be involved in outside projects. Coon stated that he had received advice from a contractor and a well driller regarding feasibility of the project, but admitted a lack of physical evidence of development. He stated that much of the time was consumed doing "analysis and several decision-affecting studies."

In a July 9, 1990, letter to Coon BLM stated that it appeared that the primary reason the spring had not been developed and the pipeline had not been installed was a lack of planning and action rather than circumstances beyond Coon's control. BLM noted that Coon's letter indicated his willingness to proceed with the project and advised Coon that it would postpone its action to partially cancel the right-of-way, giving Coon 15 days to submit a written timetable for spring development, staking the pipeline route, and installation of the pipeline. BLM stated that it would then modify or approve the timetable, but that Coon would be expected to strictly adhere to its terms.

On July 23, 1990, Coon submitted a letter stating his intent to begin construction on the spring and pipeline in November 1990 and have the work

completed by the end of the same month. An August 15, 1990, staff report notes that Coon met with BLM personnel and told them he still anticipated constructing the pipeline in November 1990 and asked BLM to mark the point of diversion for developing Pete Spring #2. On September 10, 1990, BLM marked the point of diversion with lath and orange flagging. Coon was notified of the marking in a September 11, 1990, letter from BLM.

In a staff report dated April 2, 1991, Hall stated that he made a compliance examination of the Pete Spring #2 area on March 29, 1991, and found that no work had been done either at the flagged spring development point (which was still flagged and readily visible) or the pipeline. In a staff report dated November 7, 1991, Hall stated that on November 6, 1991, he made another compliance examination of the Pete Spring #2 area and saw no evidence of any surface disturbance at the spring (which was still flagged) or along the pipeline right-of-way, and found no evidence that the pipeline had ever been staked.

Following this second field examination, BLM issued its November 12, 1991, decision partially cancelling the right-of-way, in part, for failure to use cancelled portion for a continuous 5-year period. BLM cited Coon's request for an extension of time to complete the spring development and pipeline construction and noted that Coon had tendered no explanation of why the spring and pipeline had not been developed.

In his statement of reasons, Coon states that his wife's death following prolonged cancer was personally and financially devastating, and caused a severe setback in development of the second pipeline. He notes that he also experienced a number of delays getting engineers to the job site, and states that he has spent "consideration time and effort" consulting with contractors to determine the best method for getting water off the hill.

Coon asserts that when BLM flagged the point of diversion for water from Pete Spring #2 he learned that his right-of-way started several hundred yards downstream from the source of Spring #2, on the other side of the hill between the two springs. According to Coon, the water disappears into the ground before reaching the point of diversion. Coon states that he had not been informed that the right-of-way did extend to the spring, and asserted that if he could begin development at the spring, it would be possible to use the water for irrigation, have hydroelectric generation of power, and stop erosion from the water running down the steep canyon below the spring. Coon also states his belief that there would always be sufficient seepage from the spring to sustain riparian growth.

Coon states that he was criticized by BLM for exceeding the 7-foot right-of-way on the first pipeline, and complains that he has been unable to find anyone who is willing to install the second pipeline while limited to the 7-foot right-of-way. Coon explains that this right-of-way width does not afford enough room to dig the trench and pile the dirt. Coon again expresses interest in completing the project, but says that an additional extension of time would be necessary to resolve the problems he outlined.

[1] The applicable law, 43 U.S.C. § 1766 (1988), provides in pertinent part:

Abandonment of a right-of-way or noncompliance with any provision of this subchapter, condition of the right-of-way, or applicable rule or regulation * * * may be grounds for suspension or termination of the right-of-way if, after due notice to the holder of the right-of-way * * * the Secretary concerned determines that any such ground exists and that suspension or termination is justified. No administrative proceeding shall be required where the right-of-way by its terms provides that it terminates on the occurrence of a fixed or agreed-upon condition, event, or time. * * * Prior to commencing any proceeding to suspend or terminate a right-of-way the Secretary concerned shall give * * * the holder a reasonable time to resume use of the right-of-way or to comply * * *. Failure of the holder of the right-of-way to use the right-of-way for the purpose for which it was granted, issued, or renewed, for any continuous five-year period, shall constitute a rebuttable presumption of abandonment of the right-of-way, except that where the failure of the holder to use the right-of-way for the purpose for which it was granted, issued, or renewed for any continuous five-year period is due to circumstances not within the holder's control, the Secretary concerned is not required to commence proceedings to suspend or terminate the right-of-way.

The implementing regulation, 43 CFR 2803.4, contains similar language. See also V. Irene Wallace, 122 IBLA 349, 355 (1992) (referring to abandonment language in 43 U.S.C. § 1766 (1988), and 43 CFR 2803.4(c)).

The fact that Coon did not use that portion of the right-of-way in question for a 5-year period is not in dispute. BLM issued the right-of-way grant in 1984 and in 1991 there was no evidence of use of Pete Spring #2 when the decision was issued. Thus, a portion of the right-of-way was abandoned pursuant to 43 U.S.C. § 1766 (1988) and 43 CFR 2803.4(c). In its June 19, 1990, decision BLM notified Coon in the manner required by 43 U.S.C. § 1766 (1988) and 43 CFR 2803.4(d), that it was holding the right-of-way grant for cancellation, in part, and gave Coon an opportunity to comply. See John and Katherine Caton, 126 IBLA 335 (1993); Gene Quigley, Jr., 112 IBLA 144 (1989) (holding that BLM erred in failing to provide written notice and a reasonable time to comply). BLM had sufficient grounds for terminating the grant. See 43 U.S.C. § 1766 (1988) and 43 CFR 2803.4(b).

Coon has not rebutted the presumption of abandonment by showing that his failure to use the right-of-way was due to circumstances beyond his control. Although we sympathize with Coon regarding the illness and death of his wife, we cannot conclude that these events directly caused the failure to develop the project over an extended period of time or within the timeframe for completion submitted by Coon after he had been notified that he was in jeopardy of losing a portion of his right-of-way because of his failure to use it.

By signing the right-of-way grant Coon agreed to its terms and conditions. The grant described the right-of-way as "7 feet wide by 9,200 feet long, for a total of 1.48 acres." BLM stated in its July 9, 1990, letter

to Coon: "You should be aware that you[r] right-of-way does not authorize your use at the actual spring source. Your authorization is for development of the water further down the canyon. Your right-of-way does not authorize development and use at the actual spring source." (Emphasis in original).

On appeal, Coon implies that his use was hampered because he was unable to divert the water at the spring. However, the terms and conditions of a right-of-way grant are not changed until the grant is amended. There has been no amendment, and Coon's failure to seek amendment of the grant does not constitute a circumstance not within Coon's control.

We do not believe that it would be useful to remand the case to BLM for further consideration of an extension of time. In its July 9, 1990, letter BLM attempted to accommodate Coon by giving him the opportunity to submit a reasonable timetable for development of the project and a chance to complete the project within the time frame he proposed. Coon set the November 1990 completion date, and on November 7, 1991, no work had been undertaken to develop the spring or install the pipeline. There is no evidence that Coon made a good-faith effort to complete the project, and it was reasonable and proper for BLM to cancel that portion of the right-of-way relating to Pete Spring #2.

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge